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Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

No.

BILLY SWAN, Petitioner,

VS.

THE STATE OF TEXAS, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE TEXAS COURT OF CRIMINAL APPEALS

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OCTOBER TERM, 1985

BILLY SWAN, Petitioner

VS.

THE UNITED STATES OF AMERICA, Respondent

PETITION FOR A WRIT OF CERTIORARI
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QUESTIONS PRESENTED

WHETHER THE TRIAL COURT IMPROPERLY DECLARED A MISTRIAL SUA SPONTE BECAUSE OF "CONTACT" BETWEEN A POTENTIAL WITNESS FOR PETITIONER AND A JUROR DURING THE TRIAL, ALTHOUGH THE INCIDENT WAS TOTALLY UNRELATED TO PETITIONER OR TO THE MERITS OF THE TRIAL.

WHETHER ADMISSION OF A CONVERSATION BETWEEN PETITIONER AND HIS FIRST ATTORNEY INTO EVIDENCE CONSTITUTED A BREACH OF THE ATTORNEY/CLIENT PRIVILEGE AND WAS IRRELEVANT AS REBUTTAL EVIDENCE.

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BILLY SWAN, Petitioner

VS.

THE UNITED STATES OF AMERICA, Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE TEXAS COURT OF CRIMINAL APPEALS

The Petitioner, Billy Swan, respectfully prays that a Writ of Certiorari issue to review the judgment of the Texas Court of Criminal Appeals in this cause.

OPINIONS BELOW

The opinion of the Court of Appeals for

the Eleventh Supreme Judicial District of Texas entered November 21, 1984, affirming the judgment of conviction in an opinion ordered not to be published, is attached hereto as Exhibit "A". Petitioner's Motion for Rehearing was overruled. On September 18, 1985, the Texas Court of Criminal Appeals refused Petitioner's Petition for Discretionary Review, attached hereto as Exhibit "B".

JURISDICTION

The judgment of the Texas Court of Criminal Appeals was entered September 18, 1985. No Motion for Rehearing was filed. The jurisdiction of the United States Supreme Court is invoked under Title 28, U.S.C., Section 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States

Constitution in part provides:

> ". . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law. . ."

The Sixth Amendment to the United States Constitution provides in part:

> "In all criminal prosecutions, the accused shall enjoy the right. . . to have the assistance of counsel for his defense."

The Fourth Amendment to the United States Constitution provides in part:

> "provided the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

STATEMENT OF THE CASE

Petitioner was convicted of the felony offense of theft by a jury, which set punishment at two years confinement in the Texas Department of Corrections and a $500.00 fine.

Prior to the jury trial, the Court heard evidence on and overruled Petitioner's Motions to Suppress Statements of the Defendant (RI-10-13).

Petitioner's first trial commenced. The Complainant testified that on May 4, 1983, while he was at a night club in Fort Worth, his pick-up truck was stolen between 8:00 and 10:00 p.m. He recovered the pick-up.

Stephens County Deputy Sheriff, Jim Poppenhouse, testified that on May 5, 1983, about 12:45 a.m. he and his partner, while on the lookout for one Buddy Morales, a man sought by the Federal Bureau of Investigation

and reportedly driving a red Trans-Am, were staked out east of Breckenridge at the intersection of Highways 207 and 717 and observed a pick-up truck, which was towing a second pick-up truck, stop at the intersection, delay momentarily, and then proceed to turn right. The officer followed the pick-up in his unmarked Blazer and saw that the back window in the towed vehicle was broken. The officer immediately stopped the pick-up. When the driver got out, the officer recognized Petitioner whom he had known for eight years. The officer asked about the towed pick-up, and Petitioner stated that he had just purchased the vehicle in Fort Worth at an auction. He agreed to go to the Breckenridge Courthouse so the officer could check further. After they started there, Petitioner pulled to the side of the road a second time, got out of the pick-up and underneath the towing device and told the

officer that he was having problems with the hook-up. At this time Petitioner told the officer that he was in a bind and needed a break, and offered the officer $1,000.00 if he would let him go, that "this truck is hotter than a pistol". The Petitioner also stated: "You've got me . . . I make good money on these things . . . This thing just come off the parking lot in Fort Worth". Petitioner was taken to the Sheriff's office where he was placed under arrest for theft.

At about noon on the second day of trial, the Court on its' own motion declared a mistrial.

Prior to the second trial, which began February 8, 1984, Petitioner presented his "Plea of Former Jeopardy", which was overruled by the Court and the second trial commenced (RIV-1,2; I-25-29).

Thereafter, at the second trial, the

Complainant and Officer Poppenhouse testified substantially the same.

Ricky Swan, Petitioner's brother, testified that he and Wayne Robbins were out driving and saw Petitioner at a bar in Mingus at 11:00 p.m. on May 4, 1983; that shortly thereafter they drove to Thurber where they saw a man having mechanical problems with his Chevrolet pick-up, which was hauling an unidentified late model Ford pick-up. At the man's request they volunteered to return and tell Petitioner about the problem to see if he could find a mechanic to help out. They returned to the bar and relayed the information to Petitioner who was in the process of leaving. Ricky Swan and Robbins drove off in another direction and later passed back through Thurber but did not see either Petitioner or the other man. Ricky Swan did not know whether or not Petitioner was in Ft. Worth about 8:00 p.m.,

May 4, 1983.

REASONS FOR GRANTING THE WRIT

I.

WHETHER THE TRIAL COURT IMPROPERLY DECLARED A MISTRIAL SUA SPONTE BECAUSE OF "CONTACT" BETWEEN A POTENTIAL WITNESS FOR PETITIONER AND A JUROR DURING THE TRIAL, ALTHOUGH THE INCIDENT WAS TOTALLY UNRELATED TO PETITIONER OR TO THE MERITS OF THE TRIAL.

The pretrial hearing on Petitioner's Motions to Suppress began January 3, 1984, and were followed by the selection of the jury and the testimony of the Complainant before the jury, at which time trial was recessed. On January 4, 1984, the arresting officer fully testified until the noon break. After the noon recess the following testimony was developed. Wayne Robbins, a seventy-one year old rancher and friend of the Petitioner, was present during the selection of the jury and was sworn in as one of the witnesses. After the trial recessed on

January 3, 1984, Robbins and Ricky Swan, Petitioner's brother, went to the Anchor Restaurant where juror Susan Glenn worked as a cook. (RIII-97-100). Ricky Swan bought a cup of coffee and went to a booth. Robbins bought a cup of coffee and gave the waitress a dollar, and then walked back into the kitchen area and said hello to juror Glenn "just like I always do" (RIII-102). They exchanged a few words, Robbins was in the kitchen area about a half a minute (RIII-104). Robbins gave her a $20.00 tip because she was always nice to Robbins and had given him a Christmas present but it had nothing to do with Petitioner's case (RIII-105). Robbins had already given her a pack of cigarettes in the courthouse on January 3 (RIII-105). At the time in question, Petitioner's brother was not present and had no connection with the events (RIII-105). He

had brief conversations with others at the restaurant (RIII-101).

As far as Petitioner's case was concerned, Robbins only knew that he had been with Ricky Swan about 11:00 p.m. on May 4, 1983, when they saw Petitioner at a bar and subsequently saw a stranger having trouble with a pick-up which was hauling another pick-up, which information was conveyed to Petitioner to see if he could help out. Robbins was unable to identify the pick-ups and never conveyed this information to anyone (RIII-106-109).

At this juncture, the Court inquired if the State indented to move for a mistrial, but the State declined (RIII-111).

Arleen Miller testified that she worked at the Anchor Drive-In in Breckenridge and was there on January 3, 1983, when juror Glenn arrived for work as a cook at about 5:15 p.m. Miller saw Robbins and Ricky Swan

arrive and buy coffee. Robbins handed Miller a dollar for the coffee and told her to keep the change. Swan walked immediately to a booth and sat down. Robbins increased the tip by two more quarters and then looked through his billfold where she could see a $100.00 bill. She heard Robbins say that he thought that he had something smaller. Miller jokingly said "you need this .50 cents back"? and Robbins replied "no", that he had plenty of money. Robbins put his coffee down on the counter and went into the kitchen where juror Glenn was working (RIII-116-118). Miller could not hear any conversation but as she looked into the kitchen area she saw Robbins "sort of bend over" and she saw Glenn put her hand in her back pocket. Miller saw no money change hands. Robbins was in the kitchen area a very short time (RIII-119). After Robbins and Swan had been at the

restaurant about 15 minutes they both left. Juror Glenn asked Miller for change for a $20.00 bill, as she owed $5.00 on a board bet for the Superbowl. Juror Glenn appeared to take the $20.00 bill from her right back pocket (RIII-121). Juror Glenn told Miller that "she was worried about her job today, she did say that she hoped that she wasn't the only one that kept this tied up, in other words, if she said guilty or not guilty she hoped she wasn't the only one that would be responsible for that, to be tied up to where she couldn't do her job today". She also told Miller that she had known Robbins since she was a child, that he had given her $10.00 for a Christmas present in 1983 (RIII-123). Miller described Glenn as very generous with the waitresses and the cooks at the Anchor Drive-In (RIII-123), and said that Glenn had given Robbins a Christmas present in 1983.

Miller had worked at the restaurant for

about eight months and had seen Robbins on a daily basis (RIII-125). Miller knew nothing about Petitioner's case and was not testifying that juror Glenn's ability to be a fair and impartial juror was affected in any way or that anything improper had transpired (RIII-126,127). Miller had never seen Petitioner at the drive-in and had no information that Petitioner was connected with these events (RIII-128).

The Court stated that during the noon recess the court had visited with juror Glenn "and that she told the Court that she did accept a pack of cigarettes from Mr. Robbins, one of the proposed witnesses for the defense. She indicated that she had not accepted anything else from Mr. Robbins on the 3rd of January. She indicated also that she had made no statements concerning her concern about whether or not her position on

the jury would perhaps be the only one which might cause a hung jury." (RIII-129). The Court advised Petitioner that "the Court is going to order a mistrial and you can go ahead with your bill if you want". Petitioner's counsel strenuously objected to the Court declaring a mistrial, as there was no evidence to warrant a mistrial and such a mistrial order would deprive Petitioner of his constitutional right to be tried by the jury selected to hear this case and places Petitioner in double jeopardy for the same offense; that there had been no evidence that juror Glenn was a biased juror for the State or the Defense, or any evidence that Robbins would in fact be a witness for Petitioner. (RIII-129-131). The jury was brought into the Courtroom and the Court granted the mistrial over objection (RIII-131-133).

The Fifth Amendment to the United States Constitution mandates that "no person (shall)

be subject for the same offense to be twice put in jeopardy of life or limb". The basic thrust of this concept was underscored in Green vs. United States, 355 U.S. 184, 78 S.Ct. 221, 2 L.Ed.2d 199 (1957):

> ". . . the State with all it's resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty."

When a mistrial is declared over the Defendant's objection, the question is whether under the double jeopardy clause there can be a new trial. Jeopardy attaches when the first jury in the case is empaneled and sworn. Christ vs. Bretz, 437 U.S. 28, 98 S.Ct. 2156, 57 L.Ed.2d. 24 (1978). The constitutional prohibition of twice placing a Defendant in jeopardy embraces the

Defendant's valued right to have his trial completed by a particular tribunal. Wade vs. Hunter, 336 U.S. 684, 69 S.Ct. 834, 93 L.Ed. 974 (1949); Arizona vs. Washington, 434 U.S. 497, 98 S.Ct. 820, 54 L.Ed.2d. 717 (1978).

The standard to be utilized in such cases is that articulated in United States vs. Perez, 22 U.S. (9 Wheat) 579, 6 L.Ed. 165 (1824):

> "We think, that in all cases of this nature, the law had invested Courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated."

See also United States vs. Jaramillo, 745 F.2d. 1245 (9th Cir. 1984); United States vs. Starling, 571 F.2d. 934 (5th Cir. 1978).

When the Defendant's valued right to have his trial completed by a particular

tribunal is frustrated by the mistrial order over his objection, the prosecutor has a heavy burden to show the mistrial was justified by "manifest necessity". The term "manifest necessity" has been construed to mean a "high degree" of necessity, the existence of which would depend on the type of problem at trial that prompts the Judge to consider a mistrial. The Appellate Court has a responsibility as the reviewing court to assure that the trial court engaged in a "scrupulous exercise of judicial discretion" in making the decision that a mistrial was necessary. Brady vs. Samaha, 667 F.2d. 224 (1st Cir. 1981). In applying the Perez Standard, there are no per se rules; each case is examined based upon the entire record. The Appellate Courts, in weighing the need to terminate proceedings before conclusion, have strived to balance a Defendant's valued right to have his trial

completed by a particular tribunal with the public's interest in fair trials designed to end in just judgments. Wade vs. Hunter, supra. The reviewing courts have an obligation to satisfy themselves that the trial court exercised "sound discretion" in declaring the mistrial. United States vs. Jorn, 400 U.S. 470, 91 S.Ct. 547, 27 L.Ed.2d. 543 (1971). In a number of situations, the Defendant's double jeopardy claim has been rejected on the grounds that the damage was self inflicted, i.e., caused by the Defendant himself or his counsel. See Arizona vs. Washington, supra; Abdi vs. State of Georgia, 744 F.2d. 1500 (11th Cir. 1984); Reinstein vs. Superior Court Dept. of Trial Court, 662 F.2d. 255 (1st Cir. 1981). On other occasions, it has been held that contacts with jurors are not such as to require a mistrial. In United States vs. Williams, 737

F.2d. 594 (7th Cir. 1984) no one connected with the case placed anonymous telephone calls to various jurors. See also United States vs. Fleming, 594 F.2d. 598 (7th Cir. 1979).

On a number of occasions Courts have examined various situations to determine: (1) The specifics of the incident in question and the context in which they occurred; (2) Whether the Defendant was involved; (3) Whether or not the record shows the trial court considered alternatives to a mistrial; (4) Whether the trial court afforded counsel an opportunity to be heard on the subject; (5) The amount of time devoted by the trial court to the mistrial decision. Brady vs. Samaha, Supra; Remmer vs. United States, 347 U.S. 227, 74 S.Ct. 450, 98 L.Ed. 654 (1953).

In this case the prosecution relies upon the argument that Robbins was a potential defense witness who was sworn in before the

jury, that Robbins testified he tipped juror Glenn $20.00 on the evening of the first day of trial and talked to the juror and that the juror later asked a fellow employee for change.

Petitioner submits that Robbins was never specifically identified as a defense witness but only as a potential defense witness. The record is also clear that no decision had been made as to whether he would testify; and Robbins did not testify at the second trial. Robbins' actual testimony did not establish an alibi or mistake of fact and was largely irrelevent. Petitioner was never shown to be connected in any way with the alleged "misconduct". The Record fails to show he had knowledge of it, consented to it, directed it or approved it. Actually, juror Glenn denied receiving any monies from Robbins, a long time friend although she did

receive cigarettes. There is no testimony that juror Glenn was affected in any way or was biased or prejudiced against the State in this case. Petitioner submits that no improper influence was shown. It should be emphasized that, even if Robbins had given juror Glenn $20.00, Robbins was not connected with Petitioner nor was the money necessarily related to Glenn's service as a juror. Thus, Petitioner submits that the specifics of what actually occurred and Petitioner's non-involvement in same do not rise to the level of extreme prejudice such as to warrant the drastic action taken by the trial court.

In addition, the record does not show that the trial court considered any alternatives whatsoever in this case. The trial court could have given cautionary (curative) instructions to all the jurors, to base the verdict only on the evidence before them, etc.; or the trial court could have

prohibited Petitioner from calling Robbins as a witness. Neither alternative was considered by the Court. While defense counsel was given an opportunity to cross-examine Robbins and Miller, he was not given the opportunity to cross-examine juror Glenn. He was given the opportunity to be heard by way of objection but the court did not encourage or consider any alternative action other than a mistrial. Immediately after the testimony of the two witnesses and the Court's own recitation of what juror Glenn had told the court in private, the trial court immediately and summarily declared a mistrial. See Grandberry vs. Bonner, 653 F.2d. 1010 (5th Cir. 1981); Rushen vs. Spain, 104 S.Ct. 453, 455 (1983).

In this case the onus of a second trial and the effects thereof clearly fell upon the Petitioner in a situation in which no juror

bias or prejudice was established. Petitioner suffered because of totally independent activities of a third party unrelated to his case. Petitioner submits that his second trial was barred by the double jeopardy clause and that the only proper remedy is to reverse the judgment of conviction and order the prosecution dismissed. Illinois vs. Somerville, 410 U.S. 458, 93 S.Ct. 1066, 35 L.Ed.2d. 425 (1973); Harris vs. Young, 607 F.2d. 1081 (4th Cir. 1979); Cherry vs. Director, State Bd. of Corrections, 635 F.2d. 414 (5th Cir. 1981).

II.

WHETHER ADMISSION OF A CONVERSATION BETWEEN PETITIONER AND HIS FIRST ATTORNEY INTO EVIDENCE CONSTITUTED A BREACH OF THE ATTORNEY/CLIENT PRIVILEGE AND WAS IRRELEVENT AS REBUTTAL EVIDENCE.

Ricky Swan, the sole witness at Petitioner's second trial, testified that at 11:00 p.m., May 4, 1983, he and Robbins saw

Petitioner at a bar in Mingus and later saw a third party in Thurber having mechanical problems with his Chevrolet pick-up which was towing an unidentified Ford pick-up. The man asked Ricky Swan for assistance. Ricky Swan said he would try to get his brother, Petitioner, to help out and he and Robbins found Petitoner at the bar and advised him of the stranger's problem. Later, when Ricky Swan drove through the same area, neither the stranger nor Petitioner were seen.

At Petitioner's trial and over objection, Petitioner's first attorney, Boyd L. Richie, testified in the presence of the jury as to conversations between him and Petitioner when Petitioner sought to retain him or his attorney.

> "Q. Now, at that point in time would you state to the jury what statement was made to you by Billy Swan concerning his ability to obtain a witness or witnesses?
>
> A. To the best of my recollection

> he told me that he could obtain any number of witnesses to testify to whatever facts I thought would be appropriate to furnish him a defense in the case (RIV-140).
>
> * * *
>
> Q. What did he tell you?
>
> A. Well, he kept telling me that just whatever we needed he would get (RIV-141).

There seems to be little question that the initial conference between Petitioner and Richie created the attorney/client relationship. In Re: Grand Jury Proceedings, 517 F.2d. 666 (5th Cir. 1975).

Petitioner acknowledges that the attorney/client relationship does not apply to future transactions if the client is contemplating the commission of a crime or the perpetration of a fraud, and that information given to counsel or a statement made to him with the purpose in mind of violating the law or being assisted in the commission of a crime is not privileged. The

privilege may not be used as a cloak for illegal or fraudulent behavior. In Re Grand Jury Proceedings, 680 F.2d. 1026 (5th Cir. 1982); United States vs. Friedman, 445 F.2d. 1076 (9th Cir. 1971).

However, Petitioner submits that a client who advises counsel that he could obtain any number of witnesses to testify to whatever facts counsel deems appropriate to furnish a defense may under certain circumstances evidence a good faith intention to be willing to follow the advice of competent and honest defense counsel who may be able to recognize an appropriate legal defense, even in the present situation. It is common knowledge that an accused facing criminal charges will exert considerable effort in order to assist counsel. Surely counsel could contest the lack of authority of Petitioner to drive the vehicle in question or question the

admissibility of statements made by the Petitioner when stopped by the arresting police officer. The Petitioner never told this attorney that he was going to go out and find witnesses who would lie for him, albeit that counsel apparently believed that to be the case.

The attorney/client privilege is a sacred one, designed to promote unrestrained communication between attorney and client in order that client will have the utmost confidence in the attorney and the attorney will be able to promote the just causes of the client. Here, counsel did not step forward immediately but waited until a mistrial had been declared and then volunteered this information to the prosecution in order that it could be used against Petitioner at his second trial. Petitioner submits that the introduction of such testimony was a blatant and clear breach

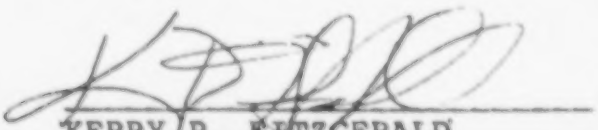
of the attorney/client privilege.

In addition, the testimony of said attorney did not constitute legitimate, relevant rebuttal evidence to the testimony of Ricky Swan. Ricky Swan's testimony did not establish an alibi or any other defense. At most, Ricky Swan established the availability of an opportunity for Petitioner to have had access to an unidentified Ford pick-up, but not that Petitioner had in good faith somehow come into possession of the Complainant's pick-up. Nor did Ricky Swan dispute that Petitioner could have been in Ft. Worth at 8:00 p.m. stealing the Complainant's pick-up. Petitioner submits that the attorney's testimony was not admissible as it was not relevant to the purpose for which it was admitted. United States vs. Dyer, 722 F.2d. 174, 178 (5th Cir. 1983).

CONCLUSION

Petitioner respectfully submits that a Writ of Certiorari should issue to review the judgment and opinion of the Texas Court of Criminal Appeals, and that this Court should reverse the judgment if conviction and either order further prosecution dismissed or remand for further proceedings.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the Petition for Writ of Certiorari to the Texas Court of Criminal Appeals was mailed, postage prepaid, to Mr. Tim Eyssen, Criminal District Attorney, Young County Courthouse, Graham, Texas, and to the

Solicitor General, Department of Justice, Washington, D.C. 20530, on this the 15 day of November, 1985.



KERRY P. FITZGERALD

STATE OF TEXAS *
*
COUNTY OF DALLAS *

BEFORE ME, the undersigned authority, on this date personally appeared Kerry P. FitzGerald, Attorney for Petitioner, who, after being duly sworn, stated:

"My name is Kerry P. FitzGerald and I am counsel for Petitioner Billy Swan in this cause. I hereby state under oath that this Petition for Writ of Certiorari was deposited in the United States Post Office, with first-class postage prepaid, on the 15 day of November, 1985, and addressed to the Office of the Clerk, United States Supreme Court, Washington, D.C. 20543, prior to the date said Petition was due to be filed in this Court, to-wit: on the 15 day of November, 1985."

KERRY P. FITZGERALD

SUBSCRIBED AND SWORN TO before me on this the 15th day of November, 1985.

Notary Public in and for
Dallas County, Texas

My Commission Expires:

3/11/89

Billy Swan

Appellant

Vs.

State of Texas

Appellee

No. 11-84-028-CR -- Appeal from Stephens County

This is an appeal from a conviction by jury of theft. Punishment was assessed at two years confinement in Texas Department of Corrections and a $500.00 fine. We affirm.

Appellant urges two grounds of error. He contends that the trial court erred: (1) in declaring a mistrial of the first jury trial sue sponte; and (2) in allowing his former attorney to testify as to certain conversations had between appellant and the attorney.

During the first trial, a hearing was held outside the presence of the jury when it was discovered that one of appellant's

prospective witnesses, Wayne Robbins, gave one of the jurors a $20 "tip" at the restaurant where the juror worked and also gave the juror a package of cigarettes. As a result, the trial court sue sponte declared a mistrial.

Appellant asserts that the trial court erred in declaring such mistrial sue sponte. During the second day of the first trial, the judge advised the jury:

> Ladies and gentlemen of the jury, I have some more information regarding the possibility of someone approaching a member of the jury and I think we need to get into that at this point. . . . But I would appreciate the juror, if there has been anyone who has been approached, coming into my office whenever I dismiss you. And I'm going to go ahead and dismiss you at this time and ask you to come back at one o'clock. If that juror would come in then I can discuss the matter with the juror.

The juror in question, Ms. Lunita (Susan) Glenn, was a waitress at the Anchor Restaurant. In the conversation between

Juror Glenn and the trial judge, Glenn told the judge that she had, during the first day of the trial, accepted a package of cigarettes from Wayne Robbins, a proposed witness for the defendant. However, during proceedings held out of the presence of the jury, Robbins testified that on the evening of the first day of trial, he gave Glenn $20 at the Anchor Restaurant as a "tip" after being present in court during that day and with the knowledge that Glenn was a juror and that he might testify on behalf of the defendant as an alibi witness. He also admitted giving Glenn the cigarettes during the first day of the trial. Robbins, however, denied discussing the case with Glenn. The giving of the $20 was partially corroborated by the testimony of another witness at the Anchor Restaurant, Mrs. Arleen Miller. Miller testified that although she

saw Glenn put her hand into her back pocket while talking with Robbins and later pull a twenty dollar bill out of that same back pocket, she never actually saw money change hands.

After Mrs. Miller testified, the following took place outside the hearing of the jury:

> THE COURT: Let the record reflect that the Court has talked with the juror, Lunita Glenn, also known as Susan Glenn, the party about which the last witness testified, and that she told the Court that she did accept a pack of cigarettes from Mr. Robbins, one of the proposed witnesses for the Defendant. She indicated she had not accepted anything else from Mr. Robbins on the 3rd of January. She indicated also that she had made no statements concerning her concern about whether or not her position on the jury would perhaps be the only one which might cause a hung jury.
>
> * * *
>
> THE COURT: [W]ith that the Court is going to order a mistrial and you can go ahead with your bill if you want.

MR. PAYNTER: Okay. Your Honor, outside the presence of the jury and after a period the Court indicates that when the jury resumes or not on the motion of the Defendant, Billy Swan, intends to order a mistrial in this case. On behalf of the Defendant, Billy Swan, I want to object and except to the proposed Motion for Mistrial, to be ordered by the Court on the basis that there is no evidence to warrant a mistrial in the case. And for further reasons that a mistrial at this time deprives the Defendant of a constitutional right to be tried by the jury that was selected to hear this case; it deprives the Defendant of fundamental constitutional rights of trial by jury. It subjects the Defendant to the-- not only the expense but it subjects him personally to double jeopardy in a subsequent prosecution for this same offense. And I would like for the record to reflect that while there is-- there has been no evidence that the juror Glenn is a baised witness-- or, pardon me, a biased juror whether for the State or the Defense. And further, there is nothing in the record here at the present time that would show that Wayne Robbins will, in fact, be a witness for the Defendant in as much as the Defendant has not even had an opportunity at this time to present his witnesses. And while there is some conjecture there at the time that Wayne Robbins may be a witness in thie case, he may or may not

testify and the Defendant may or may not offer his own testimony as well as other witnesses in the case. And for those reasons, we object to the proposal of the Court to grant a mistrial in this case.

THE COURT: All right. Such objection is overruled. If you will bring the jury in.

MR. EYSSEN: May it please the Court, may the record also reflect that Mr. Robbins at the instance of Mr. Paynter was sworn yesterday afternoon as a prospective witness for the Defense and placed under the Rule.

THE COURT: I believe the record already reflects that. But it doesn't hurt to say it again.

* * *

MR. PAYNTER: Your Honor, on behalf of the Defendant, Billy Swan, I want the record to reflect that we object to and except to the ruling of the Court declaring a mistrial, and we want the record to reflect that the mistrial is ordered without the consent of permission of the Defendant. Thank you.

Appellant argues that he was placed in double jeopardy because the declaration of a mistrial was error. It is recognized that a

mistrial may be declared sue sponte when required by "manifest necessity" or by "the ends of public justice." Torres v. State, 614 S.W. 436 (Tex.Cr.App.1981); Chvojka v. State, 582 S.W.2d 828 (Tex.Cr.App.1979); Illinois v. Somerville, 410 S.W. 458 (1973).

Appellant also argues that there is nothing in the records to indicate that the trial judge considered labeling this juror as "disabled" under TEX. CODE CRIM. PRO. ANN. art. 36.29 (Vernon 1984), dismissing such juror and continuing the trial with eleven jurors. We find nothing in the record to indicate that appellant urged this possibillity to the trial court. Since appellant did not assert this at trial, he cannot now complain of same.

Schaffer v. State, 649 S.W.2d 637 (Tex.Cr.App.1983), is relief on by appellant in support of his position. In Schaffer the trial court sue sponte declared a mistrial.

However, in Schaffer the trial court never gave an explanation as to his reasons for declaring the mistrial. Schaffer's motion pleading double jeopardy was "overruled without any statement as to whether any record had been found or why the juror was disqualified." Schaffer at 639. The Schaffer court held that the record demonstrated neither "manifest necessity" nor "that the ends of justice would have been defeated if the mistrial had not been granted." The court noted that the only evidence dealing with the juror was defense counsel's statement that a juror, already sworn and impaneled, had informed the court that he had some conversations with another person concerning the case and that he had possibly formed an opinion regarding the case. In the instant case, there is evidence of a more serious nature than mere discussion of the

case. There is evidence of possible bribery (jury tampering) by one of appellant's prospective witnesses.

After reviewing the record, we find that instant case to be distinguishable from Schaffer. Bribing a juror is serious. Robbins was a prospective witness of the appellant. He might very well have testified had the trial continued. It is conceivable that the jury might have felt him to be "aligned" with appellant. This could have had an impact on the deliberations of Juror Glenn. Therefore, we hold that the ends of justice were served by the declaration of a mistrial. We overrule the first ground of error.

Appellant asserts that the contends of the conversations between him and his first attorney, Boyd Richie, were protected by the attorney-client privileges and, therefore, the court erred in permitting said attorney

to testify.

This attorney was called by the prosecution as a rebuttal witness. His testimony revealed that appellant told him that "he [appellant] could obtain any number of witnesses to testify to whatever facts I thought would be appropriate to furnish him a defense in the case." He also revealed that appellant "kept telling me that just whatever we needed he could get." The purpose of this testimony was to establish a defense of alibi.

Helton v. State, ___ S.W.2d ___ (No. 523-82, Tex.Cr.App., June 13, 1984) (not yet reported) is dispositive of this ground of error.

> "The rule protecting the attorney-client relationship is absolute as to past transactions and offenses, but it does not apply to future transactions when the client is contemplating the commission of a crime or the perpetration of a fraud. . . . [I]nformation given to

> an attorney or statements made to him with the purpose in mind of violating the law or being assisted in the commission of a crime is not privileged, and an attorney may divulge information given or statements made with the intent and purpose of violating the law or perpetrating a fraud without in any manner violating the rule. Ott v. State, 87 Tex.Cr.R. 382, 222 S.W. 261. Williams v. Williams, 108 S.W. 2d 297 (Tex.Civ.App. - Amarillo, 1937, no writ history [sic]), at page 299 (sic)." Id. See Supreme Court of Texas, Rules Governing the State Bar of Texas art. XII, sec. 8 (Code of Professional Responsibility DR 4-101(c) (3) (1973)."

The information relayed to Lawyer Richie showed that appellant intended to perpetrate a fraud upon the district court. Under the rule espoused in Helton, Richie's testimony did not violate the attorney-client relationship. We overrule this ground of error.

All grounds of error nave been considered and have been overruled.

The judgment of the trial court is affirmed.

RALEIGH BROWN

ASSOCIATE JUSTICE

November 21, 1984

Not published, See TEX.CR.APP.R. 207.

TEXAS COURT OF CRIMINAL APPEALS

RE: Case No. 0095-85

STYLE: Swan, Billy September 18, 1985

On this day, the Appellant's Petition for Discretionary Review has been refused.

COA Number: 11-84-00028-CR

Thomas Lowe,
Clerk
Court of Criminal Appeals
P. O. Box 12308, Capitol Station
Austin, Texas 78711

EXHIBIT B